IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11/12/2003

CORAM

THE HONOURABLE MR. JUSTICE F.M.IBRAHIM KALIFULLA

W.P.No. 23558 of 2003
and W.P.Nos., 25300, 30013, 30108, 32072, 33289, 33425,
33426, 33460, 34293, 35912, 36782, 36954, 37008, 38152, 38162,
39013, 39473, 40139, 40168, 40169, 40455, 41091, 41453, 41924,
41939, 42697, 43766, 5237, 5759, 6285, 8640, 18154, 23626,
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31559, 33029, 34910, 34952, 35685, 37359, 38811, 38816,
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20520, 42907, 32356, 39680, 44669, 1122, 9187,
1123, 9911, 10002, 11657, 15547 and 1687 of 2003

And

W.P.M.P.Nos.32465, 34752, 43972, 44100, 49341, 49524, 49525,
49558, 51036, 53791, 55295, 55648, 58813, 59628,
59660, 59661, 60029, 64277, 28389, 63215, 8640, 32530,
44694, 49056, 53335, 56126, 57945, 57951 of 2002
and 10628, 18937, 21546, 24030, 19532 of 2003

W.P.Nos. 23558 of 2002:

M/s.Sunshine Enterprises,
rep. by its Proprietor Mr.Lalith Kumar,
171, Eswaran Koil Street,
Pondicherry-605 001. .. Petitioner

-Vs-

1. Union of India,
rep. by its Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi-110 001.

2. The Deputy Commissioner of Customs,
Group-VII-A, Custom House,
No.60, Rajaji Salai,
Chennai-600 001. .. Respondents

For Petitioners :: By Mr.A.K.Jayaraj and
Mr.M.Renka
Mr.F.X.A.F.Denny in their respective
W.Ps.

For Respondents :: By Mr.V.T.Gopalan, Addl.Solicitor General
assisted by Mr.J.Madanagopal Rao and
by Mr.K.Veeraraghavan

:COMMON ORDER

In this batch of Writ Petitions, the common prayer is for the issuance of Writ of Mandamus, to direct the second respondent herein to assess the respective petitioners' Bill of Entry pertaining to import of Portable Emergency Lamps, Model No.PRL-786 with DC Tubes to the usual Customs and Counter Veiling Duty on the value declared by the respective petitioners at the rate of 3.25 US Dollars per unit and 16% on the maximum retail price Rs.330/- plus SAD 4% on the assessed value and to clear the goods.

2. It is common ground that all the respective petitioners are registered importers. They imported consignments consisting of different quantities of Portable Emergency Lamps of Model No.PRL-786 with DC Tubes of Chinese Origin. The goods were stated to have been shifted from Hong Kong and were supported by Invoices and the petitioners also filed their respective Bills of Entry for the clearance of the goods.

3. It is stated that after submission of their Bills of Entry at the instance of the respondents, telegraphic communications came to be issued to the respective petitioners in respect of the consignment of Portable Emergency Lamps indicating that the value is to be enhanced to 5.25 US Dollars as per the instructions of Special Investigating Intelligence Branch (in short 'SIIB') and the respective petitioners were also called upon to put up their 'DEPB SCRIP' for the differential duty. A perusal of one such telegraphic instructions dated 28-6-2 002 filed in W.P.No.23558 of 2002 disclose that the same was by way of a 'query' to the petitioner therein, and the said petitioner also submitted its reply dated 28-6-2002 stating that having regard to the Bill of Entry as well as the Invoice relating to the said consignment, the particulars of goods was 3.25 US Dollars per unit which is the correct and true value. It was also pointed out that identical goods imported by similar other registered importers were released by accepting the value at the rate of 3.25 US Dollars per unit.

4. It is in the above stated circumstances, the Writ Petitions came to be filed. While moving the above said Writ Petitions, an order of Division Bench of this Court dated 24-9-2001 in W.A.No.1749 of 2001 was relied upon. The said order of the Division Bench is to the following effect:

"The Writ Appeal is directed against the Interim Order passed by the learned Single Judge dated 6-9-2001 in W.M.P.No.23731 of 2001 in W. P.No.15974 of 2001. The dispute relates for levy of Customs Duty on import of emergency lamps from China. According to the appellant, he was paying the

customs duty at 2.5 US $ per unit. But on knowing that the other identical dealers are paying 3.25 US $ per unit. The appellant had been voluntarily paying at the rate 3.25 US $ per unit. This was being accepted by the Department till recently. The last consignment was booked on 19-7-2001 and the same has reached on 5-8-2001. It is not disputed that as on 19-7-201, the duty which was being collected by the customs department was at the rate of 3.25 US $ per unit. If that be so, for the instant consignment what can be collected, prima facie, is only 3.25 US $ per unit. In that view of the matter, we allow the cargo to be cleared on payment of the appellant at the rate of 3.25 US $ per unit. This is without prejudice to the rights of the respondent in the pending Writ Petition. We make it clear that in the event of the Writ Petition being dismissed, then the appellant herein, who is the petitioner in the Writ Petition shall be liable to pay the difference in duty between 5.25 and 3.25 U $ per unit with interest at 12% p.a. We also make it clear that we did not touch the merits of the levy and the respective contentions, for and against as such levy, are left open to be agitated in the Writ Petition. The Writ Appeal is disposed of accordingly. No costs consequently C.M.P. No. 14620 of 2001 is closed."

5. In such circumstances, in all these Writ Petitions, while entertaining the Writ Petitions, by issuing Rule NISI, interim orders were also granted following the above referred to Division Bench Order and one such order in W.M.P.NO.31079 of 2002 in W.P.No.22493 of 2002 is to the following effect:

"In the light of the similar orders passed in W.A.No.1749 of 2001, the respondents are hereby directed to accept the payment of the petitioner at the rate of 3.25 US $ per unit and release the goods covered by bill of entry No.404642 dated 21-6-2002 pertaining to the import of 3432 pieces of Portable Emergency Philips, Model No.PRL-786 with Philips Tubes without prejudice to the contentions of the respondents.

It is made clear that in the event of the dismissal of the Writ Petition, the petitioner shall be liable to pay the difference in duty as levied by the respondents with interest at 12% p.a. Notice."

6. In this back ground, when all these Writ Petitions were grouped together and heard, the respective petitioners were represented by Mr.M.Ranka, Mr.A.K.Jayaraj and Mr.F.X.A.F.Denny while the respondents were represented by the learned Addl.Solicitor General.

7. Mr.Renka and Mr.A.K.Jayaraj, learned counsel appearing for the petitioner in the respective Writ Petitions, in their submissions, after referring to the relevant provisions of the Customs Act, as well as, Customs Valuation (Determination of Price of Imported Goods) Rules, 1988 and Customs Provisional Assessment Regulations, contended that by virtue of Section 14 read along with Rule 4, when once the registered importer sought for clearance of goods imported by submitting the Bill of entry supported by the relevant Invoice, it is incumbent upon the respondent to accept the value as quoted in the Bill of Entry, as well as, the Invoice relating to such Bill of Entry unless and until the respondents make out a definite case that such Bill of Entry, as well as, Invoices did not reflect the correct value of the goods imported by passing appropriate orders to that effect. It was also contended that any reliance placed upon by the respondents on materials collected behind the back of the petitioners cannot be validly accepted in order to deprive the

petitioners of the release of the goods on payment of duty on the value declared by the petitioners based upon the Bill of Entry as well as the supporting Invoice. In fact, Mr.M.Renka appearing for the petitioners in certain Writ Petitions, contended that in these Writ Petitions, in the counter affidavit filed on behalf of the respondents, though more than two years have lapsed after the filing the Writ Petitions, in some cases, the respondents were unable to disclose before this Court as to how they are not in a position to accept the value declared by the petitioners based upon the relevant Bill of Entry and the supporting Invoices and in such circumstances, the petitioners were fully justified in seeking for the release of the goods based on the interim orders and no further liability can be fastened on the petitioners based on irrelevant materials relied upon by the respondents and based on which materials, no definite conclusion can be reached even as on this date, that the nonacceptance of the value declared by the petitioners was justified. In other words, according to Mr.M.Renka, learned counsel of the petitioners, the respondents failed to establish to the satisfaction of this Court that the doubt entertained by the respondents to the value of the goods imported and as declared by the petitioners based on certain other informations referred to by them in their counter affidavit was not genuine and not bona fide. The learned counsel also pointed out that what was the market survey conducted by them with relevant supporting materials and also as to what was the proof in support of the allegation of the respondents to state that there was under invoicing at the instances of the petitioners. According to the learned counsel, based on mere suspicion as suggested by the respondents, the relief claimed by the petitioners cannot be rejected.

8. According to the learned counsel for the petitioners, when the bona fide importers on arrival of the goods at the Ports, filed all necessary documents, based on mere suspicion, the allegation of under invoicing cannot be presumed and in the circumstances, non-clearance of the goods at the instance of the respondents necessitated the petitioners to approach this Court for the issuance of the Writ of Mandamus as prayer for and also seek for the release of the goods pending disposal of the Writ Petitions. It was therefore, contended that even if the respondents were to be allowed to proceed to make any assessment, the petitioners should not be mulcted with any further liability apart from what had already been paid by them pursuant to interim orders of this Court at the time of release of the goods. Lastly, Mr. Renka, learned counsel for the petitioners contended that even if the respondents were to be allowed to make any assessment, at best the respondents can be directed to make their say in the form of a report to be submitted to this Court, based on which final orders can be passed in these Writ Petitions.

9. As against the above submissions made on behalf of the petitioners, the learned Addl.Solicitor General prefaced his submissions by stating that all these Writ Petitions are pre-mature; that by virtue of the provisions of the Customs Act as well as the relevant Rules framed thereunder, the respondents are fully empowered to make either a provisional assessment or a final assessment and while carrying out the above said exercise, the only mandatory requirement is to follow the relevant rules. The learned Addl.Solicitor General submitted that there is no provision in the Act or the Rules that under all circumstances, the value claimed by an importer should be accepted without any reservation. The learned Addl.Solicitor would state that by virtue of Rule 4 read along with Rule 9 as well as Section 14 of the Act,

there is every power vested with the authorities to make an investigation in the event of any doubt arising as to the value declared by the importer and the only requirement is to follow the prescribed procedure before making any further assessment as regards the duty payable by an importer.

10. As regards the contention made on behalf of the petitioner that in other Ports, similar imported items have been released by accepting the value at 3.25 US Dollars, the learned Addl.Solicitor General submitted that while each Port is independent in its functions, the procedure or assessment made in some other Port cannot be quoted as binding order of assessment on the Chennai Port and that the respondents are entitled to invoke the relevant provisions of the Customs Act and the Rules whenever they are not in a position to accept the value as declared by an importer while applying the relevant provisions.

11. While on behalf of the petitioner, reliance was placed upon the decisions reported in 2000 (122) ELT 321 (SC) (EICHER TRACTORS LTD. Versus COMMISSIONER OF CUSTOMS, MUMBAI); 1991(5)ELT 15(Bom.), 1998(97) ELT 42 (KER.) (KARAN VIR MEHTA versus COLLECTOR OF CUSTOMS, COCHIN); 1992(61)ELT 432 (BOMB.) (KAMANI OIL INDUSTRIES versus UNION OF INDIA); 1996(87) ELT 19 (S.C.) (RANADEY MICRONUTRIENTS versus COLLECTOR OF CENTRAL EXCISE); 1992(62) ELT 616 (TRIBUNAL) (SAI IMPEX versus COLLECTOR OF CUSTOMS); 1992(62) ELT 613 (TRIBUNAL) (LAXMI COLOUR LAB versus COLLECTOR OF CUSTOMS) and AIR 2001 SC 196 (M/S.EICHER TRACTORS LTD. HARYANA versus COMMISSIONER OF CUSTOMS), the Addl.Solicitor General relied upon 1983 ELT 1596 SC (S.C.) (GEEP FLASHLIGHT INDUSTRIES LTD. Versus UNION OF INDIA & OTHERS).

12. To appreciate the submissions of the learned counsel for either parties, certain provisions of the Customs Act are required to be referred to. Section 14 of the Customs Act provides as to how the valuation of goods for the purpose of assessment can be done. While Section 17 of the Act empowers the authorities to pass orders by way of making assessment of the duty of the goods imported which is otherwise known as final assessment, under Section 18, the authorities competent have been empowered to make provisional assessment of duty under certain circumstances. While invoking Section 14 of the Act, the manner in which the value is to be assessed for the purpose of duty has been set out in the Rules and the relevant Rule for our present purpose are, Rules 4, 9, 10, 10(A) and 11.

13. Under Rule 4(1), it is stipulated that the transaction value of the imported goods shall be the price actually paid or payable for the goods when sold for export to India, to be adjusted in accordance with the provisions of Rule 9. Under Rule 9, while determining the transaction value, what are the other components to be added to the price actually paid or payable for the imported goods are provided. Under Rule 4(2), in order to accept the transaction value as declared, provisos (a) to (h) have been set out. A reading of proviso (a) to (h) under Rule 4(2) would state under what circumstances, the transaction value of imported goods can be accepted as the price actually paid or payable for the goods when sold for export to India. By virtue of Rule 10, the importer or his agent is expected to furnish in the form of a declaration disclosing full and accurate details relating to the value of imported goods supported by any other statement. By virtue of Sub Rule 1 of Rule 10, the importer can also support the reliance placed by it upon the declaration made under Rule 4(1) with supporting documents. Under

Rule 10(A), when the proper officer has reason to doubt the truth or accuracy of the value declared in relation to any imported goods, he may ask the importer of such goods to furnish further information including documents or other evidence and if, after receiving such further information, or in the absence of a response of such importer, if the proper officer still has reasonable doubt about the truth or accuracy of the value so declared, it shall be deemed that the value of such imported goods cannot be determined under the provisions of sub-Rule (1) of rule 4. However, under Sub Rule (2) of Rule 10(A), at the request of an importer, the proper officer, should intimate the importer in writing the grounds for doubting the truth or accuracy of the value declared in relation to goods imported by such importer and provide a reasonable opportunity of being heard, before taking a final decision under sub rule (1). In other words, while the proper officer has been empowered under Rule 10(A) in regard to the consideration of the acceptance of the transaction value as declared by an importer under Rule 10 for the purpose of Rule 4(1) in order to make payment of duty for the release of the goods where under the proper officer has been empowered either to accept or for certain stated reasons to reject such declaration made, he should given an opportunity in the event of an importer asking for such opportunity to substantiate any such declaration made before a final decision is to be rendered under Sub Rule (1) of Rule 4. Under Rule 11 in case of a dispute between the importer and the proper officer of Customs valuing the goods, the same shall be resolved consistent with the provisions contained in sub-section (1) of Section 14 of the Customs Act. In other words, in the event of the proper officer being not in a position to deal with the release of the goods, by straightaway applying Rule 4(1) read along with Rule 10 and 10(A), thereafter the invocation of Section 14(1) comes into play.

14. Under Section 14(1) it is provided that-
"14.Valuation of goods for purposes of assessment:-
(1) For the purposes of the Customs Tariff Act, 1975 (51 of
1975) or any other law for the time being in force where under a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be-
the price at which such or like goods are ordinarily sold, or
offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where-
(a) the seller and the buyer have no interest in the business
of each other; or
(b) one of them has no interest in the business of the other,
and the price is the sold consideration for the sale or offer for sale.
Provided that such price shall be calculated with reference to
the rate of exchange as in force on the date on which a bill of entry is presented under Section 46, or a shipping bill or bill of export, as the case may be, is presented under
(1A) Subject to the provisions of sub-section (1), the price
referred to in that sub-section in respect of imported goods shall be determined in accordance with the rules made in this behalf."
Therefore, the invocation of Section 14(1) comes into play after exhausting the normal procedure as prescribed for the purpose of making an assessment under Section 17 (1) to (3) by invoking Rule 4 read along with the other Rules

9, 10 and 10(A). To put it differently, after carrying out an exercise as stipulated under Rules 4, 9, 10 and 10(A) the invocation of the provision contained under Section 14(1) comes into play by virtue of the very section rea d along with Rule 11. In such a situation, it will have to be stated that there is every scope for invoking Section 18 of the Customs Act for making a provisional assessment of duty and for making such a provisional assessment, the necessary procedural requirement to be followed have been stipulated under that very provision. In this contex t, it is also relevant to refer to Customs (Provisional Duty Assessment) Regulations, 1963. Under which, 'Conditions for allowing provisional assessment', 'Terms of the bond' and the 'Surety or security of the bond' have been provided.

15. Therefore, a reading of the above stated provisions makes it clear that a definite procedure has been laid down as to how a declared value of the importer can be accepted and under what circumstances, such declaration of the value of the imported goods by an importer can be refused to be accepted and under such circumstances, what are the other procedure to be followed for the purpose of making an assessment by following certain well laid down procedures with particular reference to the goods imported and pass either final assessment or in the event of the importer expressing his desire to have appropriate provisional assessment, to pass an order of provisional assessment depending upon the urgency.

16. Applying the above said legal provisions to the goods involved, I find that as soon as the goods imported by the petitioners arrived at the Port, they were stated to have filed the necessary Bills of Entry with supporting Invoices and thereby, invocation of Rule 4(1) was attracted. It was at that stage, it is stated that the respondents sent a 'query' to the effect that the value is to be enhanced to 5.2 5 US Dollars as per the instructions of 'SIIB'. According to the petitioners, the said 'query' virtually amounted to not only not accepting the value declared by the petitioners based on the Bill of Entry with supporting Invoices, that there was a definite demand at the instance of the respondents that the value should be enhanced to an extent of 5.25 US Dollars as against the petitioners' declared value of 3.25 US Dollars per unit; As far as the said 'query' was concerned, the learned Addl.Solicitor General has now made it clear that as the very communication goes to say that it was only a 'query', and in any event, the learned Addl.Solicitor General upon instructions clearly stated that the respondents never decided in the said communication that they have assessed the value at 5.25 US Dollars per unit as against the declared value at 3.25 US Dollars as claimed by the petitioners. According to the learned Addl.Solicitor General what was indicated in the said 'query' was the prima facie doubt of the respondents based on certain preliminary investigations undertaken at the instance of the respondents and as intimated to them by SIIB which made them to form a preliminary opinion to the effect that the declared value of the petitioners cannot be straight away accepted in regard to the goods imported, viz., Portable Emergency Lamps of Model PRL-786. When to that extent, the position has now been made clear, it will have to be stated that it cannot be held that the respondents are bound to accept the transaction value as declared by the petitioners on the import of the goods based on the Bills of Entry and the supporting Invoices submitted by them. In other words, it will have to be held that the respondents were really not convinced that the petitioners satisfied Rule 4(2) and its provisos in order to accept the

transaction value as declared by them under Rule 4(1). In such a situation, the consequence would be the invocation of Rule 10(A) of the Customs Act.

17. On a perusal of the materials available on records, it will have to be held that the petitioners approached this Court at a stage even before any further proceedings could be launched by the respondents by invoking Rule 10(A). In other words, it will have to be held that the Writ Petitions came to be filed by the petitioners at a stage which was highly premature in point of time and in fact, by virtue of the various Writ Petitions filed by the petitioners, the respondents were virtually prevented from invoking the procedures contemplated under Rule 10(A) and the other Rules and the other provisions of the Act. If that is the hurdle, which has resulted in by virtue of the pendency of these Writ Petitions, it will have to be held that it would be wholly inappropriate at this stage and in these Writ Petitions to make any attempt to evaluate the claim of the petitioners as regards the value of the goods imported in order to render a decision as regards the said value as declared by them or as doubted at the instance of the respondents. It would be travesty of justice if the claim of the petitioners in regard to the value of the goods imported is to be determined at this stage merely based upon the averments contained in the affidavits or the stand taken by the respondents in the counter affidavits filed in these Writ Petitions.

18. But at the same time, it cannot be held that merely because the respondents have come out with certain basic informations in their counter affidavits, there is every scope for this Court to make an investigation as to what should be the value of the goods imported in order to finally state one way or the other whether the declaration as made by the petitioners in regard to the value of the imported goods are to be accepted or is to be rejected based on the value suggested by the respondents based on certain informati on gathered by them as stated in their counter affidavits. If any such investigation is attempted to be made in these Writ Petitions, it would be making an unnecessary inroad into the very exercise which is to be originated from the office of the Proper Officer as provided under the provisions of the Customs Act and the Rules, in particular Rule 10(A) and 11 read along with Section 14, 17 and 18 of the Act.

19. Therefore, I am of the firm view that these Writ Petitions are highly premature in nature and have been virtually came to be filed at the instance of the petitioners to thwart the statutory exercise to be carried out by the respondents by virtue of the relevant Rules read along with the substantive provisions contained under the Customs Act. In such circumstances, it should be left to the authorities concerned to exercise their statutory power in accordance with law and in the event of the petitioners being aggrieved of any such exercise of such statutory power, the provisions of the Customs Act themselves provide for the appropriate remedy for agitating their rights.

20. Having regard to my above said conclusion, I am not in a position to countenance any of the submissions made on behalf of the petitioners at this stage. In fact, the decision relied upon by the learned Addl.Solicitor General reported in "1983 Vol.13 ELT 1596 (S.C.) (GEEP FLASHLIGHT INDUSTRIES LTD. Versus UNION OF INDIA AND OTHERS)" fully support the above said view. The Hon'ble Supreme Court has stated the legal position as under in para 24:

"24. The appellant's prayers for writs of certiorari and mandamus are misconceived. There is no order either judicial or quasijudicial which can attract certiorari. No mandamus can go because there is nothing which required to be done or forborne under the Act. The issue of the notice in the present case requires the parties to represent their case. There is no scope for mandamus to do any duty or act under the statute. A writ of prohibition cannot be issued for the obvious reason that the Central Government has jurisdiction to revise."

The above passage from the above quoted judgment of the Hon'ble Supreme Court is apposite in all respects to the facts of this case.

21. As far as the decisions relied upon by the petitioners are concerned, a perusal of the various decisions will show that in all those cases, the parties approached the Court at a stage where the action of the authorities concerned came to be questioned after their exercise of power which resulted in passing of a final order and thereby their decision came to be clearly indicated to the aggrieved parties therein. Therefore, the principles set out in the various decisions cited on behalf of the petitioners can have no application to the facts of this case. In the case on hand, going by the only communication which has been placed before the Court on behalf of the petitioners, it cannot be concluded that a valid decision came to be rendered at the instance of the respondents rejecting the transaction value as declared by the petitioners in respect of the goods imported. The said communication as the caption goes to state is only in the nature of a 'query'. In other words, it can at best be stated to be an ' expression of doubt' which looms large in the mind of the respondents in accepting the transaction value as declared by the petitioner for its face value. Beyond that, it cannot be held that that communication itself can form a basis for the rejection of the transaction value as declared by the petitioners based on the Bills of Entry or the Invoices. In any event, the learned Addl.Solicitor General having made it clear that it was only a 'query' and by virtue of the said communication, the respondents never intended to communicate the petitioners that the respondents did not accept the value as declared by the petitioners. But nevertheless the respondents were not prepared to accept the value as declared by the petitioners, though there was every possibility of the respondents invoking the relevant Rules for passing consequential orders for the purpose of determining the correct value of the goods imported by the petitioners.

22. As far as the submission made on behalf of the petitioners that having regard to the release of the goods by virtue of the interim orders of the Division bench of this Court, they should not be mulcted with any further liability, I can only state that the said question can no longer be diluted further, in the light of the binding orders of the Division Bench of this Court referred to by me earlier and extracted in the opening part of this order. Therefore, the rejection of the stand of the petitioners in these Writ Petitions would automatically result in the consequence flowing from the said order of the Division Bench which has been followed in all the subsequent interim orders pending Writ Petitions.

23. Having regard to my above said conclusions, I do not find any merits in these Writ Petitions. The Writ Petitions fail and they are dismissed. However, taking note of the pendency of these Writ Petitions, I am of the view that the respondents can be directed to hasten the process of passing appropriate orders invoking the relevant rules in order to determine

the duty payable on the goods imported by passing appropriate orders of

assessment. The respondents shall pass appropriate orders as per law within three months from the date of receipt of copy of this order. No costs. Consequently, all connected W. P.M.Ps. are closed.

Index: Yes
Internet: Yes

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To

1. The Secretary,
Union of India,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi-110 001.

2. The Deputy Commissioner of Customs,
Group-VII-A, Custom House,
No.60, Rajaji Salai,
Chennai-600 001.